Verizon Wireless
Application for a Small
Cell Wireless Facility
Installation Onto a Utility
Pole in the Right of Way
of a Public Way on
Lovejoy Road

Select Board Meeting
October 17, 2022



### Issues

- 1) Federal Telecommunications Act of 1996
- 2) Omnipoint v. City of White Plains
- 3) Special Permit and the Inspector of Buildings' Opinion
- 4) Select Board Design Rules and Regulations
- 5) Aesthetics and Small Cell Facilities
- 6) Changes to the Wireless Installation Facility
- 7) Massachusetts Replacement Pole Statute
- 8) Real Estate Values "Substantial Evidence"

### Federal Telecommunications Act of 1996

- Verizon's application is controlled by federal law and the Federal Communications
  Commission orders pursuant to that law. Unlike other permit applications which
  are controlled by State law.
- The Telecommunications Act of 1996 aims to develop wireless infrastructure by removing local regulatory barriers that restrict service providers at every level of state government. The TCA provides in part the following three prohibitions on local governments:
  - 1. May not 'unreasonably discriminate among providers of functionally equivalent services.'
    - ➤ The Select Board approved a small cell facilities application by AT&T for 308 Lowell Street in 2020.
  - 2. Take actions that 'prohibit or have the effect of prohibiting the provision of personal wireless services.'
  - 3. Limit the placement of wireless facilities 'on the basis of the environmental effects of radio frequency emissions'.
- Denial must have "substantial evidence" in a written decision.

# Omnipoint Communications Inc. V. The City of White Plains

Omnipoint Communications Inc. V. The City of White Plains 430 F2d 529 (2nd Cir. 2005) is not a valid comparison.

- In 2005 City's Planning Board denied Omnipoint's application for a permit to erect a <u>150-foot telecommunications tower</u> on a privately owned golf course. Trial court ruled that the Board's decision was unsupported by substantial evidence and ordered White Plains to pay to Omnipoint \$1,327,665 in damages and \$231,152 in attorney fees. The City won on appeal with the United States Second Circuit Court of Appeals concluding the Board's decision was supported by substantial evidence;
- Decision of the Second Circuit (New York) is not binding in Massachusetts which is in the First Circuit;
- Case involved a 150-foot communications tower on private property and not a small cell cannister and antenna placed on a 41-foot-high utility pole in a public right of way;
- Does not discuss small cell (5g and 4g) technology and Federal Communications Commission orders and court cases since 2005 regarding small cell technology.

# Special Permit and the Inspector of Buildings' Opinion

The Inspector of Buildings' October 12, 2022 opinion to the Town Manager states:

Article VIII, section 9.1 of the Town's Zoning By-Law states: "This by-law shall be administered by the Inspector of Buildings."

In regard to the Verizon Wireless proposal of a small cell facility on Lovejoy Road, if the applicant replaces the existing utility pole within the public right of way of the public way on Lovejoy Road with a new utility pole in the ROW, in my opinion, the applicant would not be required to obtain a Special Permit pursuant to section 6.0 of the Town's Zoning By-Law.

## Select Board Design Rules and Regulations

These Rules and Regulations describe approved aesthetic and location criteria for Small Cell Wireless Facilities (SWF) in the Town of Andover. These requirements apply to both the SWF and accessory equipment, such as ground-mounted equipment.

#### 1. Background

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To address the growing demand for wireless technology across the United States, cellular providers propose to increase the capacity of their networks by deploying small cell infrastructure (Small Cell), a new lower-powered antenna technology, to reduce data traffic load on roof mounted equipment and larger cell towers. This new technology requires infrastructure to be installed in closer proximity to the users on the ground. ..... New Small Cell facilities will improve the provider's ability to meet the public's current 4G (LTE) voice and data demands and the future 5<sup>th</sup> generation cellular needs for interconnected devices to operate at high speeds to access data.

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<u>Like other utilities, federal law allows Small Cell infrastructure equipment in the public right-of-way</u>. Balancing the need to accommodate increasing cellular demand while preserving public space character and function is critically important, as is the need to design and place the proposed infrastructure in an appropriate way.

## Select Board Design Rules and Regulations

#### 2. Adoption

These Rules and Regulations are intended to cover the general standards and aesthetics for the design and installation of Small Cell and similar technology.

#### 4. Aesthetic Requirements for Small Cell Wireless Facilities

Except when Small Cell infrastructure is attached to a wood pole, poles and all equipment must be the same color and finish as surrounding streetlight poles or third party poles.

Exposed wires are not permitted. Corporate or company names (except for location identification purposes noted below), logos, identifying graphics or other advertisements shall not be painted, embossed, applied or displayed in any manner on the poles equipment closures (boxes, cabinets, etc.), hand hole covers, or other component of the poles.

Individual location identification information will be permitted, provided no letter, number, or graphic symbol is taller than one inch in height.

Standalone Poles: The height of any standalone pole including its antenna(e) shall not exceed 32 feet or no more than 10 percent taller than any other adjacent poles, whichever is greater.

Wood Poles: The height of any replacement wood pole including its antennae shall not exceed 45 feet.

## Changes to the Wireless Installation Facility

In its application, Verizon agreed in writing to the following:

- No small cell wireless installations shall be installed on double poles;
- No small cell wireless installation shall be installed on poles which are not ADA compliant;
- No small cell wireless installations shall remain within the Town right of way or on Town property which has not been certified as in use in the annual re-certification affidavit;
- No small cell wireless installation equipment shall be replaced or altered without a reapplication, hearing, and approval from the Board of Selectmen unless the equipment is no longer properly functioning, and it is being replaced with the same or substantially similar equipment.

At the October 3, 2022 Select Board hearing, the Verizon representative stated Verizon "cannot make any changes to the wireless facility once it is installed unless the Town does approve" and "any potential modifications, if any, and I am not aware of any, that we would need to make, would need to come to the Town for approval".

#### Middle-Class Tax Relief and Job Creation act of 2012

- For existing wireless towers in a public way, the maximum increase is 10 feet, not 20 feet.
- Verizon's waiver
- Condition of approval for changes

## Massachusetts Replacement Pole Statute

Massachusetts General Laws Chapter 166, Section 22 states in part:

No order of the board of alderman or selectmen shall be required for renewing, repairing or <u>replacing</u> wires, cables, <u>poles</u>, piers, abutments, conduits or fixtures once erected or constructed under the provisions of law, or for making house connections or connections between duly located conduits and distributing poles.

## Real Estate Values – "Substantial Evidence"

- 1. Massachusetts Licensed Real Estate Appraiser Report
  - No personal interest in the matter.
  - "Comparable sales" method relating to a 45-foot (allowed) telephone pole in a public right of way; not a 150-foot telecommunication tower.
  - Public way comparable to Lovejoy Road having other telephone poles with transformers at the top.
  - Similar to appraisals (not real estate agent opinions) for Select Board relating to Town acquisition of land.
- 2. Court case upholding a denial of a small cell facility on the basis of real estate values.
- 3. Select Board Rules and Regulations